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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-301

JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH, individually and as Members of the Board of Education of the City of Buffalo, STANLEY M. MAKOWSKI, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

Petitioners,

against

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Respondents,

and

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUISE E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS, individually and as Members of the Board of Regents of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Respondents Nyquist, Board of Regents, and Members of the Board of Regents,
The Capitol,
Albany, New York 12224,
Telephone: (518) 474-7138.

RUTH KESSLER TOCH,
Solicitor General,

JEAN M. COON,
Assistant Solicitor General,
of Counsel.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
(716) 344-2080, (716) 343-0457

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is submitted, on behalf of respondents New York State Commissioner of Education, the Board of Regents of the University of the State of New York, and the individual members of the Board, in opposition to the petition by the Mayor and Common Council of the City of Buffalo and the Superintendent of Schools and the Buffalo Board of Education, seeking review by certiorari of the decision of the United States Court of Appeals for the Second Circuit (573 F. 2d 134; Appendix J to the petition), which reversed in part and affirmed in part a decision of the United States District Court for the Western District of New York (415 F. Supp. 904; Appendices C, D, G and I to the petition), which had found the Buffalo schools to be unconstitutionally segregated and that both the State and City defendants were responsible therefor. The Circuit Court affirmed as to the City defendants and reversed as to the State defendants.

Questions Presented

1. Does not the record evidence fail to supply the requisite proof of intent to segregate on the part of the State defendants, regardless of whether the Circuit Court's test complies with prior decisions of this Court?

2. Where the evidence differed as to the acts of the State and City defendants could not the Circuit Court arrive at different conclusions in the responsibility of each for the segregation of the Buffalo schools?

3. On review of the Circuit Court's decision, are not references by the District Court to independent non-governmental party actions irrelevant where the Circuit Court did not refer to them or apparently consider them?

Constitution and Statute Provisions Involved

Respondents see no relevancy in the citation of 42 U.S.C. § 2000c-6 in the petition, which section relates solely to Federal action and no Federal agency is a party to this action.

Respondents also note that subdivision 2 of New York Education Law, § 3201, quoted in the petition, was declared unconstitutional in *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y., 1970), affd. 402 U.S. 935, prior to the commencement of this action and is no longer a part of the law of the State of New York and is irrelevant to this action.

Similarly, the provisions of the New York Public Housing Law, quoted in the petition are irrelevant since housing discrimination was not considered by the Circuit Court as contributing to petitioner's responsibility for segregation.

Statement of the Case

A. Procedural History

This action was commenced on June 26, 1972, by service of the complaint, seeking a declaratory judgment and injunctive relief under 42 U.S.C. § 1983, contending that defendants* had deprived plaintiffs and others similarly situated, who are parents of children enrolled in public schools in Buffalo, of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs alleged that the public schools in the City of Buffalo are racially segregated as a result of "policies, practices, customs and acts of omission and commission" by defendants and by other units and agencies of government.

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* At the time the action was commenced only the State Commissioner of Education, the Board of Regents, the Superintendent of Schools of the City of Buffalo and the Buffalo Board of Education were named as parties defendants.

The State defendants moved to dismiss the complaint on; among other grounds, lack of subject matter jurisdiction of the action and failure to join as parties the other units and agencies of government whose acts were alleged to have caused or contributed to the segregation of the Buffalo schools. The City defendants also moved to dismiss the complaint. That latter motion was orally denied by the Court. No decision was ever issued on the State motion nor order entered on the Court's decision as to the City's motion.*

After a long period of examinations before trial, the action was tried over a period of nine days in the Fall of 1974. Thereafter, plaintiffs moved to amend their complaint to add the mayor and common council of the City of Buffalo as parties defendant; which was granted. Subsequently, a second motion was made and granted to add the individual members of the Board of Regents and Buffalo Board of Education as parties defendant, in both their official and individual capacities.

On April 30, 1976, the Court handed down its decision holding that defendants had violated plaintiffs' Fourteenth Amendment rights to equal protection of the laws by intentionally causing and maintaining a segregated school system in the City of Buffalo. Also on April 30, 1976, the Court granted plaintiffs' motion to add the new superintendent of schools and the individual members of the Board of Regents and the Board of Education of the City of Buffalo as defendants.

On June 10, 1976, the Court amended the second order of April 30, 1976 to specifically state that the Board members were added as defendants in their official capacities only and not as individuals.

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* The District Judge before whom those motions were heard died several months thereafter.

On June 16, 1976, counsel for eight of the members of the Board of Regents moved for reconsideration of the Court's April 30 judgment on the merits of the action. That motion was subsequently joined in by counsel for the other State defendants. On August 17, 1976, the Court orally denied these motions and on December 10, 1976, handed down a formal decision and order thereon.

Subsequent to the decision of this Court in *Austin Independent School District v. United States*, 429 U.S. 990 (1976), the District Court directed the parties to analyze and brief the application to this action of the decision in *Austin* and that in *Washington v. Davis*, 426 U.S. 229 (1976). Thereafter, on March 1, 1977, the Court reaffirmed its decision of April 30, 1976.

All defendants appealed to the United States Court of Appeals for the Second Circuit which, by decision dated March 8, 1978, affirmed the District Court's decision as to the City defendants and reversed as to the State defendants. From that decision the city defendants have now petitioned this Court for certiorari.

B. Facts

In 1960, the Board of Regents of the University of the State of New York ("the Regents"), which has statutory policy making authority over education in the State of New York, both public and private, and elementary, secondary and higher education, issued a policy statement urging the desegregation of New York State's public schools. Similar policy statements have been issued by the Regents periodically from that time to the present, all reaffirming a policy position for the elimination of racial imbalance in the public schools, whether a result of *de facto* or *de jure* segregation. In 1963, all school boards were requested by the then Commissioner of Education, James Allen, to identify to

the State Education Department those schools in their districts having a black enrollment in excess of 50%. Guidelines for desegregation were drawn up with primary emphasis on local control and local action to effect desegregation.

In 1964, the City of Buffalo Board of Education ("the Board of Education") fixed the attendance zone for a newly constructed junior high school (Woodlawn), selecting a plan for that zone which resulted in the school being over 90% black, although other plans had been proposed which would have resulted in a racially integrated school. Certain parents of Buffalo school children took on appeal to the Commissioner of Education, a proceeding provided for in the New York Education Law, alleging that the Buffalo public school system ("BPSS") was racially imbalanced, that the Board of Education had failed to take action to alleviate imbalance and that there was also discrimination against blacks in the recruitment and distribution of teachers. As to the latter charges, the Commissioner found no supporting evidence had been presented. The Commissioner on that appeal found *de facto* segregation to exist in the Buffalo schools *(Matter of the Appeal of Yerby Dixon*, Ed. Dept., Rep. 115).

In his decision in *Yerby Dixon*, then Commissioner Allen found (p. 118):

> "It must be apparent to the petitioners, however, as well as to everyone else concerned, that there is not and cannot be an easy or instant solution to the problem which is the main thrust of this appeal. Involved in the ultimate solution to *de facto* segregation in a school system is of course the elimination of segregated housing, slum conditions and other undesirable scio-economic conditions which lie beyond the control of the board of education or of the Commissioner. Not only is the problem *per se* a complex and difficult one in Buffalo, but the Board of Education is handicapped by the fact that it is by law fiscally dependent on the municipal government and that the city school district is severely restricted by the constitutional tax limitation."

Those limitations are no less true today and there is no question but that they have severely limited the progress which could be made in racially balancing Buffalo schools. In that appeal, the Commissioner ordered (pp. 118-119):

> "Jurisdiction over this appeal is retained by me pending the adoption by the Buffalo Board of Education of a plan for mitigating the problem of racial imbalance which meets with my approval. Furthermore, I am reserving the right to make such further order or orders in this case as shall be necessary to effectuate a plan approved by me.
>
> "*It is ordered* that the Board of Education of the City School District of the City of Buffalo prepare, approve and submit to me on or before May 1, 1965, a plan for the progressive elimination of racial imbalance, including the steps to be taken in this direction beginning with the school year 1965-66."

Initial attempts to implement racial integration were the immediate subject of legal challenge. The Second Circuit Court of Appeals in *Offermann v. Nitkowski*, 378 F.2d 22 (1967), affg. 248 F. Supp. 129, recognized that there is no constitutional duty to undo *de facto* segregation in the schools, but upheld the constitutional right of the State to elect to do so and to direct compliance by local school districts. The State's actions thereafter must be viewed from the standpoint of a policy of undoing *de facto* segregation, rather than a confrontation with *de jure* segregation.

In the February 1965 order, the Commissioner directed that a plan for elimination of racial imbalance be submitted to him by May 1, 1965. The report was submitted by the Board on May 1, 1965 and objections thereto were filed on behalf of the appellants in *Yerby Dixon*. A hearing was held by Commissioner Allen on August 18, 1965 and his findings were sent to the Buffalo Board of Education by letter dated October 8, 1965 (Ex. 160, Ex. III thereto). In that letter, Commissioner Allen stated:

> "I find the report submitted by the Board for the progressive elimination of racial imbalance disappointing. It fails to come to grips realistically with the problem and to present a long range solution or to identify the barriers which must be overcome in order to reach a solution. I do not feel that the Board's report deals in sufficient depth with the large and complex problems facing the school system."

The letter points out that a meeting was held in Buffalo between the Commissioner, the President of the Board of Education and the Superintendent of Schools which was followed on September 22 by a statement requesting the assistance of the State Education Department in the preparation of a plan to eliminate racial imbalance. The Commissioner appointed the Associate Commissioner for Research and Evaluation to work with the Board of Education on such a plan.

In January 1966, the Commissioner appointed an Advisory Committee for the Study of Buffalo Schools, chaired by Ira Ross, President of the Cornell Aeronautical Laboratory. Arrangements were made for a study to be made by the Center for Urban Education ("CUE"), a national educational laboratory, supported by Federal funds appropriated under Title IV of the Elementary and Secondary Education Act of 1965. The report, entitled "A Plan for Accelerating Quality Integrated Education in the Buffalo Public School System" was transmitted to the Board of Education on August 23, 1966 by Commissioner Allen (Ex. 160, Ex. III thereto).

On September 14, 1966, the Buffalo Board of Education approved the plan "in principle" (Ex. 160, Ex. III). On the same date, Commissioner Allen wrote to the president of the Buffalo Board of Education requesting that the Board file with him, by October 15, 1966, its plans for elimination of racial imbalance (Ex. 160, Ex. III). This deadline was subsequently extended to November 15, 1966 (Ex. 160, Ex. III).

On November 3, 1966, the Superintendent of Schools submitted to the Board of Education a plan for racial balancing of the schools, generally referred to in this litigation as "The 16 Point Plan" (Ex. 160, Ex. III). The basic proposals of this plan were neighborhood schools for first 5 grades, ultimately K-4; assignment of inner-city pupils in Grades 6-8 to schools in peripheral areas of the city; construction of West Hertel School as a middle school; planning and construction of a new eastside high school; and one demonstration middle school to open in September 1967. The remaining proposals were primarily programs in compensatory education for inner-city pupils.

The primary differences between the CUE proposal and the Board proposals were the proposal for an educational park at the old State University campus, a greater emphasis on faculty and administrative integration; and the consolidation of all schools into 5 districts with educational parks (Ex. 160, Ex. III).

The Board report was submitted to Commissioner Allen on November 14, 1966 (Ex. 160, Ex. III).

Special state-aid for integration assistance was approved for Buffalo for the 1966-67 school year in the amount of $130,558.50 for project SITUP at School 54 and for coordination of integration (Ex. 160, Ex. III).

On June 7, 1967, Commissioner Allen again wrote to the President of the Buffalo Board of Education pointing out that the Buffalo recommendations had been the subject of a hearing at which all parties to the *Yerby Dixon* appeal were given an opportunity to be heard and submit additional data. As to the Board proposal, the letter states (Ex. 160, Ex. III):

> "The latest recommendation and accompanying materials submitted by the Board have been reviewed by the staff of the Department and by me and, I am sorry to

say, are found to be disappointing and unsatisfactory, lacking in specificity and devoid of any real evidence of a serious intent on the part of the Board to reduce significantly racial imbalance in the Buffalo School System."

Commissioner Allen directed then Deputy Commissioner Nyquist and staff members of the Education Department to visit Buffalo and consult with the Board concerning the kind of plan and program of action which would be needed (Ex. 160, Ex. III). That meeting was held in July, 1967 after which Deputy Commissioner Nyquist wrote to the President of the Board of Education setting forth in detail the areas of disappointment with the Board's recommendations (Ex. 160, Ex. III). Those were 1) a lack of a detailed comprehensive plan with a definite timetable for action; 2) a lack of practical steps to educate public opinion toward integration; 3) a lack of depth in the integration planning staff of the Board; and 4) "the submission of a full plan has taken more time than seems warranted under the circumstances" (Ex. 160, Ex. III). The date of November 15, 1967 was set as the date for submission by the Board of a timetable for development and carrying out of an integration plan. That was eventually changed to require an interim report by November 15 and a final report by December 15 (Ex. 160, Ex. III).

The December 15 deadline was extended at the request of the Board to January 31, 1968. A subsequent request was made for a further extension to March 1, 1968 (Ex. 160, Ex. III). Commissioner Allen directed that a plan be submitted by January 31 to be updated on March 1 and to constitute the Board's "firm commitment" (Ex. 160, Ex. III). On January 30, 1968, the Board transmitted its recommendations to Commissioner Allen (Ex. 160, Ex. III). The Board recommended the organization of the school system into a 6-4-4 program. The six-year unit to include pre-kindergarten and Grades K-4, to be housed in neighborhood schools. When neighborhood

schools in inner-city require replacement, they would be built in peripheral areas where an integrated student body could be enrolled. The Board recommended a middle school program of 15 schools to be integrated 1/3 black and 2/3 white. These would include Fillmore, which had been converted to a middle school, conversion of Genesee-Humboldt and Southside Junior High Schools to middle schools and the construction of 12 new schools. Woodlawn would be developed as a "magnet school" and Clinton discontinued and its student body dispersed.

As to secondary schools, the Board recommended inclusion of all ninth grades in the high school buildings, study of high school programs, expansion of vocational courses; construction of a comprehensive high school on southeast side of the city, development of a school at Main and Delevan, development of a plan to either integrate East High or distribute its pupils in other high schools, and open enrollment at all high schools on a city-wide basis. The Board recommended planning for an educational park or parks, including a metropolitan educational park, if possible.

The Board proposed a school construction schedule which would open the West Hertel Middle School in September, 1969; add a 5th grade to Fillmore in September, 1970; open the new Main-Delevan High School and the new East Side High School in September, 1971; Genesee-Humboldt and Southside Junior High Schools would be converted to middle schools by September, 1971; and between September, 1971 and September, 1973; at least 4 additional middle schools would be opened each year.

Recommendations for staffing included placement of more black teachers in white schools, and increased emphasis on recruitment of black teachers.

On May 21, 1968, Commissioner Allen replied to the Board's recommendations (Ex. 160, Ex. III). In his letter, the Commissioner stated:

> "The January 31, 1968 report presents a comprehensive plan for improved racial balance with a definite timetable for action."

After recapitulating the major points of the recommendation, the letter concluded:

> "After a detailed examination of the Board of Education report of January 31, 1968 and considering the continuing action of your Board and staff, I ask that you continue planning and acting toward the progressive elimination of racial imbalance; and that you transmit to me as of November 15, 1968, a report of action taken toward meeting the plans and any further amendments or improvement in planning which affect the policy of the Board of Education."

Had the 1968 plan been implemented, Buffalo schools would have been substantially integrated. However, implementation was delayed. The Common Council delayed approval of final funding of the West Hertel Middle School, denied funding for planning or construction of other middle schools and passed zoning legislation which sought to bar the use of portable classrooms for the integration of existing schools. This latter legislation was ultimately held invalid.

In 1969, Chapter 342 of the New York Laws of 1969 was enacted by the State Legislature which prohibited an appointive school board from setting attendance zones or assigning pupils for the purpose of racial balance. The Board of Education construed that law as preventing any integration moves except voluntary transfers. Plans were made to implement such voluntary assignments of pupils (Ex. 128). That statute was ultimately held unconstitutional (*Lee v. Nyquist, supra*), but it had the interim effect of delaying integration.

The report for 1970 indicated progress being made toward integration of Buffalo schools which, if carried through, would have achieved the aim of the Commissioner's 1965 order.

Unquestionably, the basic proposal of the Board of Education for integrating the schools was the Middle School program.

However, in December, 1971, a letter from the Buffalo Citizens' Council on Human Relations to Commissioner Nyquist contended that the Common Council would not appropriate necessary school construction funds, and that the Board of Education would not change its plans for integration even though the Common Council inaction had made the plan impossible to carry out, and, indeed, that the Board had failed to carry out some of its other promises that did not need funding (Ex. 41).

By letter dated January 20, 1972, the Commissioner wrote to the Board (Exh. 42):

> "I ask that you strengthen your efforts to develop a plan different from the one originally formulated as a consequence of the *Yerby Dixon* appeal. I do not suggest that eventual implementation of a 4-4-4 plan of organization be precluded, but do strongly urge the elimination of segregation in the early grades where integration is most easily achieved and most effective in the lives of children."

The Commissioner requested the Board to submit, by April 1, 1972, a new desegregation plan which would substantially reflect the racial composition of the entire district with an interim report by February 15, 1972 on progress.

On March 23, 1972, the Board advised the Commissioner (Ex. 51):

> "We regret to advise you that we are unable, consistent with our responsibilities as we see them, to submit any plan to you by which, within the period of time you apparently have in mind, '*** every school would substantially reflect the racial composition of the entire district. ***' "

On March 28, 1972, the Board "received and filed" a staff report entitled "A Study of Desegregation" (commonly referred to as the "Heck Report") (Ex. 47). At the same meeting the Board expressed itself as opposed to "any form of forced busing". The following day, Arnold Gardner, who was then President of the Board of Education wrote the Commissioner alleging willful refusal on the part of the Board and listing what he contended were acts of *de jure* segregation on the part of the Board (Ex. 50).

On April 6, 1972, Commissioner Nyquist advised the Board that he was directing members of his staff to work with the Board in developing a desegregation plan (Ex. 52). On May 22, 1972, the Commissioner's task force arrived in Buffalo and remained for two weeks.

On November 8, 1972, the recommendations of the task force, in the form of a plan for desegregation, were transmitted to the Board by Commissioner Nyquist with a request for response by January 3, 1973 (Ex. 131).

For grades K-8, the plan proposed two alternatives. The first was the Heck plan proposal; the second added elements to that plan. The plan would create 5 districts, all including a part of the black residential section of the city. Within each district a 4-4-4 plan would be established, with all schools integrated from K-12. All children would be transported for only 4 of the first 8 years of school. The second alternative would divide K-8 grades into 3 sections with all schools in a district serving the same grade levels located as close together as possible. This would involve more busing than the first

proposal. Under the first plan the annual cost for busing for integration would be $2,874,716; after the first year, State reimbursement would reduce the city's cost to $287,472. The cost of transportation in the second plan would approximate $4,000,000 in the first year, with subsequent annual costs of $400,000. It was anticipated under the Heck plan all schools could be integrated by September, 1974 and a year earlier under the second alternative.

The Board voted to "receive and file" that report as well and to advise the Commissioner that the Board "did not find in the report any basis for a solution of the problem before it" (268).

Of course, by this time not only was the instant action pending (commenced June 26, 1972) but also an HEW compliance review which had been commenced in February, 1971 and was subsequently suspended pending the outcome of this action.

Commissioner Nyquist testified at the trial of this action that, because of the lapse of time since the 1965 order, before making a final order relative to desegregation he had proposed to hold a hearing on a show cause order and that that hearing and those relating to school districts other than Buffalo had been postponed because of the Commissioner's hospitalization in the spring of 1974. The show cause orders were subsequently issued and hearings scheduled relative to 5 school districts in the State, including Buffalo.

As to some cities, final desegregation orders have been issued. The hearing relative to Buffalo resulted in the approval of a desegregation plan submitted to the Court below as a proposed remedy in the instant action. Commissioner Nyquist further testified as to events which occurred since he took office in 1969:

> "Beginning since I became Commissioner and I think in the preceding questions, we brought that out. The law

was passed just before I became Commissioner which eventually was declared unconstitutional which prevented me from doing anything about racial integration really, except encouraging it. I can do that, and when that was cleared up, I decided to take a little different tact from my predecessor and that is to involve the community and try by persuasion to get a plan developed. It is a much better, sounder way of going about it and that took time. It was,—and I also wanted to build, let the Board and the community have,—the Board, really, because they are in charge, give them every possible opportunity so that looking towards in the kind of political climate we had at that time, including Mr. Nixon's stand on busing, looking toward the time that if an appeal were taken by the Board, I would have a sound, reasonable, painstaking legal record of what had been done. Just about that time, my Director of Division of Intercultural Relations who does this work had a heart attack and died and that also held us up and we were short of staff, and then in '73 bringing it down to that time, we had a couple of new Regents on the Board and they wanted to be involved in the proceedings and to see if they couldn't help and I think here in Buffalo that was the case, and that brings down, that took some more time. That brings it down to April of '74 when I had already issued three show cause orders in three other communities and two more to go and one of them was Buffalo and I had a heart attack and I didn't recover fully from that until July.

"Q. Is that July '74? A. Yes, this year. By that time, on advice of counsel and my Deputy Commissioner and my own conviction, I didn't think that we should issue an order for,—you know, opening of school coming the first of September and so that we waited then for the Supreme Court decision to see if the Detroit case would help us any and it didn't and then along about that time, finally the Regents themselves raised the question, a couple of the Regents, should they not review their racial integration policy. We have had the exhibits here and I expect them and because I was not going to issue a final order if that was the outcome of a show cause order on a hearing, because I wouldn't issue it for the opening of school in '74, I just decided to wait and the Regents are going to come out with their new policy and in a sense of after reconsidering it, they may reaffirm it. I don't know what they will do. I am hopeful they will reaffirm it. That will come at the end of October. I think that's the whole story covering the five years I have been Commissioner."

The Regents did in fact reaffirm their prior position as to racial balance.

The Commissioner further testified that after a show cause hearing, he could issue a final order relative to desegregation of the schools. Testimony then proceeded:

"Q. *** Now, when you issue this final order, Dr. Nyquist, and if you did issue a final order after such a hearing, which was disobeyed, is that the time that you consider taking the steps of exercising your powers of sanction? A. Yes. That is true. I mean, you can't take away State aid or ask or try to institute proceedings through Board members until you have issued a final order and that hasn't been done."

On October 10, 1973, Dr. Nyquist issued a report to the Regents concerning his integration reports which included Buffalo as well as other communities (Ex. 151). The part of the report concerning Buffalo recounted the recalcitrance of the Board of Education in 1972 and 1973 and rejection of integration plans advanced by the Commissioner. It then concluded (920-921):

"Because of this impasse, the Commissioner was left no alternative but to order the Buffalo Board of Education to implement a plan of desegregation prepared by the State Education Department. Accordingly, on August 2, [1973], the Division of Intercultural Relations submitted to the Deputy Commissioner two copies of a draft of a show cause order for

desegregation of the Buffalo Schools. The order is currently [10/10/73] in office of counsel. It embodies the essential elements of the study prepared by our staff in 1972. Meanwhile, Regent Genrich has been making an attempt to obtain cooperation of the Buffalo Board of Education."

C. Decisions Below

I—The District Court Decision of April 30, 1976

The District Court initially recognized that the question which had to be proven by plaintiffs on the trial was whether segregation in the Buffalo schools was brought about by "*purposeful* or *intentional* segregative acts"; citing *Keyes v. School District No. 1* (413 U.S. 189 [1973]) in which the Supreme Court of the United States held that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation *** is *purpose* or *intent* to segregate" (413 U.S., p. 208). The Court then stated its construction of the proof necessary to show intent:

> "In deciding the question of intent, the court is not required to find guilt or innocence, prejudice or evenhandedness, or even 'badness' or 'goodness' on the part of the defendants. To prove their case, plaintiffs are not required to show that racist motives prompted the defendants, nor even that defendants wanted the schools to be segregated, although proof of either of these would be sufficient to show the required intent. It is enough, as the Second Circuit explained in *Hart v. Community School Board*, 383 F. Supp. 699 (E.D.N.Y. 1974), *aff'd* 512 F. 2d 37 (2d Cir., 1975), to show that the probable and foreseeable result of the defendants' acts was segregation. In *Hart*, the district court found that the school board had unconstitutionally segregated a school despite the court's specific finding that the school board was not racially motivated. The board appealed this decision. The Second Circuit stated:

> 'Unless the Supreme Court speaks to the contrary, we believe that a finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation.' *Hart, supra,* 512 F.2d at 50."

The Court thus clearly relied upon the "natural and foreseeable consequence" test to determine intent.

The bulk of the Court's opinion deals with an evaluation of acts of the city defendants, rather than the State defendants.

The Court concluded as to the Buffalo Board of Education and the Common Council:

> "The Board's course of action for the last two decades, and more specifically since 1965, has been consistently dilatory, evasive and at times obstructionist. Though there are some clear instances of positive Board action to integrate the BPSS, these actions were consistently taken under pressure and were inevitably designed to see the Board through the immediate crisis and to stall more extensive and effective efforts.
>
> "The actions of the City Council were very similar. Whenever the Board of Education was forced to implement integration plans, even if quite modest, the City Council quickly shut off the money supply or enacted an ordinance that would effectively negate the Board's actions. And, like the Board, if the City Council were forced to act, it would always find the route of least possible integrative consequence, hoping to stall until another day any meaningful integration."

However, dealing with its view of the State defendants' responsibility for segregation in the Buffalo schools, the Court relied primarily upon their power of supervision of the educational system of the State rather than upon specific acts, stating:

> "The actions of both the State Regents and the Commissioner of Education over the past two decades, and particularly since 1965, weave a saga of much talk and insufficient action, at least as far as the BPSS is concerned."

Concerning the directive of former Commissioner Allen to the Board of Education, mandating that the Board devise integration plans, and the continued efforts to secure cooperation from the Board, the Court stated:

> "This court does not quarrel with the initial decision to defer to local authorities to solve what is admittedly a complex and demanding situation. Chief Justice Burger has suggested that 'local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.' *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). Both the Commissioner and the Regents acknowledge this concept (PX 304, at 2). But, when effective local action is not forthcoming, and no reasonable person could expect that it will be forthcoming, and repeated attempts at cajoling, pleading and coercing the local authorities into action have failed, there comes a time when those individuals with both the power and responsibility to act must assert themselves. Deference to local authorities is not an absolute and binding requirement. It is a policy decision with a defined and limited rationale, *i.e.*, that the local authorities have a greater degree of knowledge and insight into the complexities of local concerns. However, when the local authorities refuse to accept the responsibility that is theirs, State authorities have no recourse but to act. Neither the Commissioner nor the Regents did so in the case of the Buffalo public schools."

The Court then reviewed what had occurred in the years since the decision in *Yerby Dixon, supra.* In this respect, the Court detailed the Board of Education plan of January, 1968, and observed that the plan would have effectively integrated

the fifth through twelfth grades. Difficulties which occurred in 1968 in the implementation of that plan relative to portable classrooms and the middle school plan—the heart of the integration plan—was clearly attributed by the Court to the Common Council. As to the 1968 plan, formulated three years after *Yerby Dixon*, the Court concluded that "Had it been implemented, integration could have been achieved on a broad scale". Similarly, the Court attributed the Council's failure to negotiate for the purchase of Bishop Ryan High School to segregative motives of the Common Council, not of entities within the jurisdiction of the State defendants.

The Court's criticism of the State defendants rested mostly upon what the Court considered to be a failure to take strong decisive action. However, commenting upon defendant Nyquist's letter of January 1972, ordering the Board of Education to devise a new plan integrating all grades to reflect in each school the racial composition of the entire district, the District Court stated:

> "Following seven years of weak leadership and continued acquiescence in the Board's dilatory actions, this stern and comprehensive order provoked, perhaps predictably, a strong and divisive reaction among Board members."

That reaction prompted the Commissioner to send a State task force to Buffalo to develop a plan to be submitted to the Board, thus removing further initiative for integration planning from the Board of Education. That plan was, as the Court noted, rejected by the Board of Education in January, 1973.

While the Court was critical of the Commissioner's failure to remove members of the Board of Education or withhold State aid from Buffalo, the Court also recognized that no final order yet had been issued pursuant to which the Commissioner could take that action.

As to the State defendants, the Court found no affirmative acts of segregation, but rather concluded:

> "At the time this case was submitted for decision, ten and one-half years had elapsed since the 1965 *Yerby Dixon Appeal* and no significant improvement in desegregating the public schools in Buffalo had taken place. The Commissioner's actions over those ten years amount to a mountain of paper work with little substantive results. The lack of effective action by the Regents and by the Commissioner of Education has continued, and in some instances aggravated, racial segregation in the Buffalo public schools."

The District Court's finding of State liability was thus based not on segregative acts or intent but rather on lack of success in achieving integration of the schools in Buffalo.

The Court's conclusions are, when compared to the proof, themselves revealing (1165):

> "As the Supreme Court has often noted, 'it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.' *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). The same can be said for the motivation or motivations behind the actions of a school board or board of regents. When, however, the court is faced with a decade and more of intransigence and obstruction, of delay and procrastination, the interpretation of motivation becomes less difficult. The record in this case substantiates plaintiffs' claim that the Board of Education, the Superintendent of Schools, the Commissioner of Education and the Board of Regents intentionally created and maintained, in substantial part, the segregation in the BPSS."

and:

> "[T]he failure of the Board of Regents and the Commissioner of Education to take effective steps to end the segregation in Buffalo's public schools—all of these are evidence of a systematic program of segregation."

The State defendants were thus held liable for a lack of effective action—rather than an intent or purpose to segregate.

II—The District Court Decision of March 1, 1977

Subsequent to the December 7, 1976 decision of this Court in *Austin Independent School District v. United States*, 50 L. Ed. 2d 603, the District Court in the instant action requested the parties to brief *Austin* and *Washington v. Davis*, 426 U.S. 229 (1976) as they might apply to the instant decision, as well as this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 50 L. Ed. 2d 450, which was also considered by the parties.

The District Court then proceeded to hold that the "natural and foreseeable consequences" test may be utilized to demonstrate the discriminatory intent required by the decision in the above-cited cases. The Court then reconsidered its April 30, 1976 decision and concluded that it had there found intentional discriminatory acts on the part of defendants.

III—The Court of Appeals Decision of March 8, 1978

The decision by the Court below recognized first that it is only intentional or *de jure* segregation which is constitutionally prohibited by the decisions of this Court (App. J., p. 174a) and that to succeed a plaintiff "must be able to show that school officials purposefully or intentionally acted to segregate students" (*ibid.*). The Court then considered the problems inherent in proving segregative intent and set forth the standard by which it analyzed and judged the record in the instant case (App. J., pp. 175a-176a):

> "In our opinion in *Hart v. Community School Board of Education*, 512 F. 2d 37 (2d Cir. 1975), this court sought to strike a balance between competing views of 'segregative intent' by extracting from those views that which we found conceptually defensible, and at the same time that which was consistent with the Supreme Court's constitutional mandate. In *Hart*, we held that a finding of *de jure* segregation could be based on acts of omission or commission undertaken by governmental authorities, which have the 'natural and foreseeable consequence of causing educational segregation.'

"We took note of the Supreme Court's recognition of the difficulty of applying a subjective standard of proof in this area. See *Hart v. Community School District Board of Education, supra,* 512 F.2d at 50 citing *Palmer v. Thompson,* 403 U.S. 217 (1971) and *Keyes v. School District No. 1, Denver, Colorado, supra,* 413 U.S. at 233-34. See also, *Arlington Heights v. Metropolitan Housing Development Corp., supra,* 429 U.S. at 264-68; *Washington v. Davis, supra,* 426 U.S. at 253-54 (Stevens, J., concurring); *Wright v. Council of the City of Emporia,* 407 U.S. 451 at 461-62 (1972). And we cited with approval the opinion of the Court of Appeals for the Sixth Circuit in *Oliver v. Michigan State Board of Education,* 508 F.2d 178 at 182 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975):

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.
> [Citations omitted.]

See also, *NAACP v. Lansing Board of Education,* 559 F.2d 1042 (6th Cir.), *cert. denied,* 46 U.S.L.W. 3390 (Dec. 13, 1977), which reaffirms the Sixth Circuit's holding in *Oliver.*"

In view of the petitioner's construction of the Court's interpretation and application of its decision in *Hart* (Pet. pp. 26, 35-39), it is significant to note the Court below's own analysis of that case and its application (App. J., pp. 176a-177a):

> "In *Hart,* we rejected a purely subjective standard of proof because we were unable to make good sense of the notion of a 'collective will' which 'intends' a certain outcome, and because of the 'injustice of ascribing collective will to articulate remarks of particular bigots,' *Hart, supra,* 512 F.2d at 50. We also noted the very difficult

problems of proof inherent in the adoption of a subjective definition of 'intent.'

"At the same time, we avoided espousing a purely objective test of intention, for such a view would be excessively broad, bringing virtually all racial imbalance within the rubric of *de jure* segregation.* Furthermore, mere foreseeability cannot be identified with intention, for there are surely many cases in which events are both known to be likely, but nevertheless not intended.*

"In *Hart,* we steered a course between objective and subjective theories of segregative intent by holding that foreseeable consequences, while not specifically identifiable with intention, can provide evidence for its presence. See *Hart, supra,* 512 F.2d 50, 51. Hence our approval of the Sixth Circuit's opinion in *Oliver,* which indicated that foreseeable results created a presumption of segregative intent which could be rebutted by a showing that state actions were consistent with racially neutral policies. Furthermore, we stressed that segregative intent could only be inferred in the context of an examination of alternative policies available to state officials. *Hart, supra,* 512 F.2d at 51.

"In adopting this approach, we focused not on the mental processes of a changing group of school board members, but rather on the actions taken by the board itself. When such actions have the 'natural, probable, and foreseeable result of increasing or perpetuating segregation,' a presumption of segregative purpose is created. The burden of proof then shifts to defendant officials to show that the pattern of actions taken by those officials can be explained in a manner consistent with the absence of segregative intent. Put differently, once the burden of proof has shifted, school officials must be able to demonstrate that no reasonable alternative policy would have achieved the same permissible educational goals with less segregative effect. When such a showing cannot be made, it is entirely reasonable to infer that the officials acted with unlawful segregative intent."

* Footnotes omitted.

Petitioners here, as in the Court below, rely upon this Court's remand of *United States v. Texas Education Agency*, 532 F. 2d 380 (5th Cir., 1976), remanded *sub nom. Austin Independent School District v. United States*, 429 U.S. 990 (1976), as a repudiation of the "foreseeable consequences" test employed in *Hart*. In that respect, the Court below stated (App. J., pp. 177a-178a):

> "The reasoning which underlies the remand of *United States v. Texas Education Agency* is not clear from the Court's one-line *per curiam* opinion. Justice Powell's concurring opinion appears to locate the lower court's error in its readiness to infer segregative intent exclusively from the use of neighborhood schools, 429 U.S. at 991-92. But this does not apparently challenge the standard used to infer segregative intent, as much as its particular application in that case. Furthermore, Justice Powell appears to approve of the inference of segregative intent from other findings made by the district court. See 429 U.S. at 991-92, n. 1.
>
> "In *Arlington Heights v. Metropolitan Housing Development Corp., supra,* 429 U.S. 252, the Court lists a number of factors, not intended to be exhaustive, which can provide evidentiary support for a finding of segregative intent. These factors do not, however, appear to be in any way inconsistent with the analysis developed in *Hart*. See also *Washington v. Davis, supra,* 426 U.S. at 253 (Stevens, J., concurring).
>
> "In sum, then, we believe that the *Hart* test remains valid even after the Supreme Court's opinions in *Washington v. Davis, Arlington Heights v. Metropolitan Housing Development Corp.*, and *Austin Independent School District v. United States*. We find that it is a cogent application of the Supreme Court's requirement of proof of segregative intent, that it avoids conceptual pitfalls inherent in alternative approaches, and that it provides a method of proof which is fair to both plaintiffs and defendants in cases of alleged unlawful racial segregation."

Applying those tests to the actions of the State defendants, the Court concluded (App. J., pp. 184a-185a):

> "We cannot disagree with the trial court's finding that it would have been possible for the state appellants to have intervened more forcefully in this matter. Nor can we say that, given the chosen policies of the state appellants, it was unforeseeable that the Buffalo schools might remain segregated for an extended period of time.
>
> "We do not, however, believe that this kind of inaction on the part of state supervisory personnel can, under the standards promulgated by the United States Supreme Court, be said to constitute intentional segregation, and hence a constitutional violation. As we indicated in *Hart v. Community School Board, supra,* 512 F.2d at 48:
>
> > We assume that mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation.
>
> To argue otherwise would be to adopt the strictly objective view of segregative intent rejected above because it collapses *de facto* and *de jure* segregation, in effect making all continued toleration of segregation *de jure*. The state appellants have shown that legitimate policy considerations warranted their hesitation in intervening actively in the conduct of the Buffalo school system, and that the drastic remedies available to them could legitimately have been judged inappropriate under the circumstances of this case.
>
> "Of course, if it could be shown that state and local officials conspired to thwart state anti-segregation policy, our conclusion would perforce be different. But we have searched the record, and are unable to find any indication of such complicity, posturing, or bad faith.
>
> "Similarly, we do not believe that the appellees' theory of derivative or indirect liability can be sustained. Such a theory is precluded by the Supreme Court's opinion in *Rizzo v. Goode, supra,* 423 U.S. 362, which requires a

more direct link between the illicit school segregation and an intentional policy adopted by the state appellants which indicates specific approval of the actions of the city appellants. No such approval is indicated in this case.

"Under the standard announced in *Hart*, then, we are unable to conclude that the state appellants acted or omitted to act with the required segregative intent, and hence we must reverse the trial court's finding of liability as to these appellants."

ARGUMENT

Certiorari should not be granted in this case since the Court below, applying a liberal standard of liability, found that insufficient proof of segregative intent had been shown as to the State defendants.

The question presented by the petition is whether the decision of the Court below is consistent with the recent decisions of this Court, *e.g. Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan H. D. Corp.*, 429 U.S. 252 (1977); *School District of Omaha v. United States*, 433 U.S. 667 (1977).

In *Austin Independent School District v. United States*, 429 U.S. 990 (1976), this Court vacated a judgment of the Court of Appeals for the Fifth Circuit, which had found a constitutional violation in the administration of the schools in Austin, Texas, and remanded the case to that Circuit for consideration in the light of *Washington v. Davis*, 426 U.S. 229 (1976).

In *Washington*, this Court stated that the Equal Protection Clause of the Constitution prohibits "official conduct discriminating on the basis of race", but added (426 U.S., p. 238):

"*** our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact."

This Court then cited *Strauder v. West Virginia*, 100 U.S. 303 (1880), wherein the Court held:

"A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the prescribed race or by an unequal application of the law to such an extent as to show intentional discrimination."

The rule that an "intent to discriminate" must be shown was also stated in *Wright v. Rockefeller*, 376 U.S. 52 (1964), involving congressional apportionment. As to school segregation cases, this Court stated in *Washington* (426 U.S. p. 240):

"The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action *** the differentiating factor between de jure segregation and so-called de facto segregation *** is *purpose* or *intent* to segregate.' Keyes v. School District No. 1, 413 U.S. 189, 205, 208 (1973)."

Having cited the above cases, this Court specifically rejected the concept that "the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative

classifications." The evidence necessary to sustain a finding of unconstitutional discrimination was discussed at length in this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp., supra.* This Court there discussed not only the test of unconstitutional discrimination which is to be applied, but also the type of evidence needed to prove such discrimination. Referring to *Washington v. Davis, supra,* this Court said that that case had "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. *** Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." As to the evidentiary standard to be applied, the Court's opinion states (429 U.S., pp. 265-268):

> "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.
>
> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it 'bears more heavily on one race than another,' *Washington v. Davis,* 426 U.S., at 242—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race,

> emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins,* 118 U. S. 356 (1886); *Guinn v. United States,* 238 U.S. 347 (1915); *Lane v. Wilson,* 307 U.S. 268 (1939); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960). The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence.
>
> "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See *Lane v. Wilson, supra; Griffin v. County School Board,* 377 U.S. 218 (1964); *Davis v. Schnell,* 81 F. Supp. 872 (SD Ala.), aff'd *per curiam,* 336 U.S. 933 (1940); cf. *Keyes v. School District No. 1,* 413 U.S., at 207. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. *Reitman v. Mulkey,* 387 U.S. 369, 373-376 (1967); *Grosjean v. American Press,* 297 U.S. 233, 250 (1936). For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
>
> "The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See *Tenney v. Brandhove,* 341 U.S. 367 (1951); *United States v. Nixon,* 418 U.S. 683, 705 (1974); 8 Wigmore, Evidence § 2371 (McNaughton rev. ed. 1961).

> "The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." (Footnotes omitted.)

The Court below in the instant case clearly recognized that the plaintiffs' burden was to show that "school officials purposefully or intentionally acted to segregate students" (App. J., p. 174a). Referring to its decision in *Hart v. Community School Board of Education*, 512 F 2d 37 (2d Cir., 1975), the Court below stated (App. J., p. 175a):

> "In *Hart*, we held that a finding of *de jure* segregation could be based on acts of omission or commission undertaken by governmental authorities, which have the 'natural and foreseeable consequence of causing educational segregation.' "

However, in *Hart*, as the Court pointed out below, the opinion also cited with approval the opinion of the Court of Appeals for the Sixth Circuit in *Oliver v. Michigan State Board of Education*, 508 F 2d 178 (1974), *cert. den.* 421 U.S. 963. in which that Court stated (508 F 2d, p. 182):

> "A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies."
> (Citations omitted.)

This approach to proving segregative intent is consistent with that adopted by the Court of Appeals for the Eighth Circuit in *United States v. School District of Omaha*, 521 F. 2d 530, and in which this Court denied certiorari (423 U.S. 946), as noted by this Court in its remand of the same case in a later appeal for consideration of the remedy (433 U.S. 667 [1977]).

The approach adopted by the Court below, that is, a presumption arising out of foreseeable consequences creates a liberal standard for establishing liability. However, even applying that liberal standard, the Court found that segregative intent had not been proven on the part of the State defendants, although it did find acts of the City defendants which fulfilled its concept of the evidentiary standard for proof of segregative intent.

In this respect, it is essential to note that the Board of Regents acts primarily as a legislative policy-making body, establishing educational policy for all institutions of learning in New York, both public and private, at the elementary, secondary, and college or university levels. The Board has no direct function in the administration or supervision of public school systems in the State.

The Commissioner of Education of the State of New York is appointed by the Regents and operates as head of the State Education Department. That Department has specific statutory powers of supervision of the various school districts of the State in the implementation of educational policy as prescribed by the Legislature and the Regents. Neither the Department nor the Commissioner administers the schools or is entrusted with responsibility for their day-to-day operation.

The operation of the schools is the function of local school districts under extensive "home rule" powers granted to them by the State Constitution and statutes.

The Commissioner also has judicial powers whereby he can hear appeals from decisions of local boards of education. It is pursuant to this power that Commissioner Allen heard and decided the *Yerby Dixon* appeal in 1965.

Additionally, in certain large city school districts, such as Buffalo, appropriations for school district expenses are con-

trolled by the Common Council of the City. At the time this action was commenced, the members of the Buffalo Board of Education were appointed by the Mayor.

The opinion of the Court below makes it clear that the evidence as to the State defendants did not support findings of intentional segregation by those defendants (App. J., pp. 182a-185a):

> "The record is significantly different with respect to the state appellants. As early as 1960, the New York State Board of Regents issued a policy statement urging desegregation of New York's public schools. This expression of intent has been reaffirmed on many subsequent occasions.
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> • • •
>
> The Commissioner found that *de facto* segregation existed in Buffalo, and ordered the Board of Education to submit an integration plan within three months.[23] The Commissioner subsequently found this plan inadequate, and appointed an Advisory Committee to develop a satisfactory program.
>
> "The Buffalo Board of Education approved the proffered program 'in principle,' but then submitted a plan which the Commissioner found 'disappointing and unsatisfactory.' Finally, on January 30, 1968, the Board submitted a plan which the Commissioner found acceptable. The Board was then ordered to submit periodic reports on the implementation of the program.
>
> "This plan, had it been implemented, would likely have reduced racial segregation in the Buffalo schools, but the City's Common Council refused to appropriate funds to implement the Board's plan. In January, 1972, the Commissioner instructed the Board to submit a new desegregation plan; the Board refused to submit such a plan. The Commissioner then sent members of his staff to Buffalo in order to work with the Board in designing a desegregation plan. The Commissioner's staff submitted its recommendations to the Board in November, 1972, but the Board rejected the proposals.

> "Finally, in January, 1975, following recovery from a heart attack, the Commissioner issued a show cause order to the Buffalo Board of Education in which he threatened to exercise his statutory enforcement powers.
>
> • •
>
> "We cannot disagree with the trial court's finding that it would have been possible for the state appellants to have intervened more forcefully in this matter. Nor can we say that, given the chosen policies of the state appellants, it was unforeseeable that the Buffalo schools might remain segregated for an extended period of time.
>
> "We do not, however, believe that this kind of inaction on the part of state supervisory personnel can, under the standards promulgated by the United States Supreme Court, be said to constitute intentional segregation, and hence a constitutional violation. As we indicated in *Hart v. Community School Board, supra,* 512 F.2d at 48:
>
> > We assume that mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de factor* rather than *de jure* segregation.
>
> To argue otherwise would be to adopt the strictly objective view of segregative intent rejected above because it collapses *de facto* and *de jure* segregation, in effect making all continued toleration of segregation *de jure*. The state appellants have shown that legitimate policy considerations warranted their hesitation in intervening actively in the conduct of the Buffalo school system, and that the drastic remedies available to them could legitimately have been judged inappropriate under the circumstances of this case."

However, as to the City defendants, the Court did find specific acts which it considered proof of segregative intent, for example (App. J., pp. 180a-182a):

> "The district court acted well within its discretion in finding, for example, that the Buffalo school board redistricted East High School in a series of actions which

began at least as early as 1954. The cumulative effect of these actions was the exclusion from the district of areas of white population density and the inclusion of areas of black population density, making East High School virtually an all-black school. Furthermore, the school board permitted students to transfer from their local high schools when those schools did not teach a particular foreign language when the student wished to study. Substantial evidence indicates that this policy was used to manipulate the racial composition of East High School by systematically permitting white students to transfer to high schools with white majorities. In at least some instances, different standards for obtaining 'language transfers' were applied to black and white students.

• • •

"We believe that Judge Curtin did not err in finding that these changes in attendance zones and the granting of language transfers had the natural and foreseeable effect of increasing racial segregation in the Buffalo schools. At the same time, alternative policies were available to the Board which would have achieved its educational goals while avoiding increased segregation. It follows that the Board's policies give rise to a valid presumption of intentional segregation by Buffalo school authorities.

"The district court further found that while the siting of Woodlawn School in the North Masten District was based on racially neutral economic and demographic considerations, the formulation of the school's attendance zone was not. While several possible arrangements which permitted integrated education were proposed, that plan which resulted in the school's having a student population over 99% black was selected. Evidence suggests that this decision was strongly influenced by residents who opposed integrated schooling.

"The school board permitted the operation of 'optional areas,' allowing white students to avoid attending

predominantly black schools. This policy clearly had the foreseeable effect of contributing to racial segregation in the Buffalo schools.

"Furthermore, discriminatory admission policies in the city's vocational schools, and racially biased recruiting and assignment of staff members, suggest intentional segregation by the school board."

Those different findings are internally consistent applications of the standard of proof applied by the Court below and do not provide a basis for the grant of certiorari.

CONCLUSION

The petition for certiorari should be denied.

Dated: July 17, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
Attorney for Respondents Nyquist, Board of Regents, and Members of the Board of Regents.

Ruth Kessler Toch,
Solicitor General.

Jean M. Coon,
Assistant Solicitor General.

of Counsel.